LEE ENG HOE

v.

PP

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[NOTICE OF MOTION NO: MT1-44-2-2003]
30 SEPTEMBER 2003

CRIMINAL PROCEDURE: *Bail - Reduction of, application for - Application by bailor - Whether bailor has locus standi to apply - Whether application must always be made by accused - Criminal Procedure Code, ss. 389, 394*

This was a notice of motion by the proposed bailor ('the applicant'), under s. 389 of the Criminal Procedure Code ('the Code'), for an order that the bail amount of RM200,000 imposed by the Sessions Court on the accused be reduced to RM100,000 on the ground that the amount imposed was prohibitively high and excessive. The question of law that arose for decision, via the prosecution's preliminary objection, was whether the applicant had the *locus standi* to make the said application. It was submitted for the prosecution (citing *Mohan v. PP* [2002] 5 CLJ 483 HC) that the applicant was not the 'person aggrieved' as envisaged by s. 394 of the Code.

Held (overruling the preliminary objection):

[1] The instant application was not an appeal under s. 394 of the Code. It was an application brought under s. 389 of the Code. Section 394 refers, expressly and specifically, to the statutory right of appeal under Chapter XXXVII of the Code. Consequently, s. 394 of the Code was not applicable to the instant application. (pp 406 f-h & 407 a-d)

[2] The powers of the High Court under s. 389 of the Code are unfettered. Parliament never intended any limitations or restrictions with regard to the parties who may apply to reduce an amount of bail imposed. Consequently, a proposed bailor, such as the applicant, has the *locus standi* to apply to have an amount of bail reduced. (pp 407 d-h & 408 a-e)

Case(s) referred to:
Mohan v. PP [2002] 5 CLJ 483 HC ***(not foll)***
PP v. Dato' Mat [1991] 2 CLJ 1112; [1991] 1 CLJ (Rep) 385 SC ***(refd)***
PP v. Zulkifflee Hassan [1990] 2 MLJ 215 SC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 389, 394

For the DPP - Dzulkifli Ahmad
For the applicant - Francis Hilary D'Cruz (Kesavan P Krishnan); M/s Kesavan & Assoc

Reported by Gan Peng Chiang

JUDGMENT

Low Hop Bing J:

Application

This is a criminal application by way of a notice of motion filed by one Lee Eng Hoe, a proposed bailor, under s. 389 of the Criminal Procedure Code for an order that the amount of bail of RM200,000 imposed by the sessions court Melaka on the accused, one Ahmed Wadji Lee bin Abdullah in Criminal Summons No. 62-59-2003 on 12 September 2003, be reduced to RM100,000 on the ground that that amount of bail is prohibitively high and excessive.

For convenience, a reference to a section in this judgment is a reference to that section in the Criminal Procedure Code.

Preliminary Objection

An interesting, important and novel question of law was raised in the preliminary objection by the prosecution ie, that a proposed bailor has no *locus standi* to make the instant application which, in the view of the prosecution, must perforce be made by the accused himself and not by any other person.

Hence, the question of law which this court has to determine may be formulated as follows:

> In an application in the High Court under s. 389 of the Criminal Procedure Code for a reduction of the amount of bail imposed by a subordinate court, does a proposed bailor who is prepared to execute a bail bond in the reduced amount of bail, have the *locus standi* to file the application?

Prosecution's View

Encik Dzulkifli bin Ahmad, learned deputy public prosecutor, as stated above, is of the view that the proposed bailor has no *locus standi* to file this application. He contended that s. 394 provides that only a person "aggrieved" may appeal to the High Court and that such an aggrieved person is the accused and not a proposed bailor.

He added that s. 394 must be read with s. 389 and that a bailor is in a weaker position than an accused, relying on *Mohan v. PP* [2002] 5 CLJ 483 HC and *Public Prosecutor v. Dato' Mat* [1991] 2 MLJ 186 SC.

Submission For Applicant

Encik Francis Hilary D'Cruz, assisted by En. Kesavan P. Krishnan, for the applicant, contended that as the instant application is a criminal application, s. 394 and s. 389 must be strictly construed.

They submitted that s. 394 which refers to "any person aggrieved" has nothing to do with a bailor or a proposed bailor. They opined that s. 389 is not similarly restricted as there was nothing to restrict the right of application to the accused only, citing *Public Prosecutor v. Zulkifflee bin Hassan* [1990] 2 MLJ 215 in support thereof, in which the then Supreme Court has given a wider interpretation to s. 389.

They added that the court could intervene in the interest of justice.

Decision Of The Court

A proper perusal of the application herein demonstrates that the applicant is relying solely on s. 389. That being the case, the application would succeed or fail on the basis of the construction to be placed on s. 389 and no other section.

In *Mohan v. PP, supra*, two issues appeared to have arisen for determination by Augustine Paul J (now JCA). The judgment clearly showed that the dominant question is whether it is lawful for the court to require security to be furnished by a bailor when executing a bail bond. This dominant issue has no relevance to the aforesaid question of law for determination before me in the instant application.

The next and final question in *Mohan, supra*, is whether a bailor can seek to vary the amount of bail in respect of which he has executed the bond. In this respect, the learned judge held that the bailor is not entitled in law to do so, by referring to s. 389 and s. 394 and said:

Section 389 refers, *inter alia*, to the power of the High Court to reduce or increase the amount of bail required by a court. It is a power that is exercisable once an order for bail has been made. As it refers to a variation of the bail amount required it contemplates a situation where the bail bond has not been executed. The only person who has an interest in the amount of bail required is the accused. Section 394 refers to a person "aggrieved" by an order that has been made. Such a person is one who has been affected by the order that has been made. A bailor is not a person affected by an order for bail and is therefore not a person "aggrieved" within the meaning of the section. It follows that under both the sections a bailor is not a person with an interest to move the High Court. In the circumstances a bailor is not entitled in law to seek a variation of the amount of bail in respect of which he has executed the bond.

For the sake of completeness, s. 389 and s. 394 merit reproduction as follows:

389 Amount of bond

The amount of every bond executed under this Chapter shall be fixed with due regard to the circumstances of the case as being sufficient to secure the attendance of the person arrested, but shall not be excessive; and a Judge may, in any case, whether there be an appeal on conviction or not direct that any person be admitted to bail or that the bail required by a police officer or Court be reduced or increased.

394 Appeal

Any person aggrieved by any order or refusal of any inferior Court made under this Chapter may appeal to the High Court, which may confirm, vary or reverse the order of such inferior Court.

I shall deal with s. 394 first.

This section confers upon any person aggrieved by an order or refusal of any inferior court to appeal to the High Court. It is plain and obvious to me that s. 394 refers expressly and specifically to an appeal, in which case, the statutory right to appeal is confined to a person aggrieved by an order or refusal of an inferior court to grant bail. In the context of s. 394 only, I am in entire agreement with the view of Augustine Paul J (now JCA) that "A bailor is not a person affected by an order for bail and therefore not a person aggrieved within the meaning of that section".

However, the application herein is not based on s. 394 and this application is not an appeal by an accused person. The application before me does not attract the application of s. 394.

Section 389, on the other hand, contains two limbs *viz.* first, the amount of a bail bond and, secondly, the power of a judge to direct that any person be admitted to bail, or to reduce or increase the amount of bail.

In *Mohan, supra,* Augustine Paul J (now JCA) said, *inter alia,* that the only person who has an interest in the amount of bail required is the accused. In so far as s. 389 only is concerned, the judgment of the learned judge is not as wide as has been submitted for the prosecution that under s. 389, only an accused person has the *locus standi* to file an application for, *inter alia,* a reduction in the amount of bail. The learned judge has indeed read both the aforesaid sections together, as opposed to construing s. 389 only, for the purposes of arriving at the following conclusion:

> It follows that under both the sections, a bailor is not a person with an interest to move the High Court.

In the circumstances, with utmost respect, I am of the view that *Mohan, supra,* did not support the contention for the prosecution.

In *Public Prosecutor v. Dato' Mat, supra,* Wan Yahya, J (later SCJ) in delivering the judgment of the then Supreme Court reiterated, *inter alia,* at p. 188H left, that the High Court has an unfettered judicious discretion in dealing with an application under s. 389.

The Supreme Court also followed the judgment of Gunn Chit Tuan SCJ (later CJ(M)) of the Supreme Court in *Public Prosecutor v. Zulkifflee bin Hassan, supra,* that under s. 389, the words "in any case" import that the powers of the High Court are unfettered.

In view of these two authoritative judgments of the Supreme Court, I am of the opinion that our High Courts should not impose any fetters under s. 389 when Parliament has in its wisdom declined to follow the words used in s. 394, as has been submitted for the applicant herein.

In my view, Parliament in enacting s. 389 has never imposed any limitation or restriction as to the party who may file an application such as the instant application. The fact is that Parliament has left the category of applicants open, in which case, our High Courts exercising the jurisdiction thereunder are able to decide on the issue of *locus standi,* untrammelled or unfettered by the express category of applicants under s. 394. In an application under s. 389 such as the instant application, our High Courts are absolutely free to decide by reference to the facts and circumstances prevailing in each application. I would therefore construe the express provisions of the second

limb of s. 389 as including and not limiting or restricting the applicant, a proposed bailor, as one of the categories of applicants having the necessary *locus standi* to file the instant application.

Our system of granting bail and deciding on the amount of bail is one which involves multiple parties *viz*. the accused, the proposed bailor or surety, the presiding officer and the court or the registrar of the court granting the bail. The court or registrar has to determine whether a proposed bailor may be accepted as such for the purposes of executing the bail bond, having regard to the conditions of bail such as the deposit of a fixed deposit receipt from a bank or financial institution, the original copy of a title deed of landed properties together with a valuation report from a qualified valuer, other similar securities or the surrender of the international and/or the restricted passports of the accused person. These are real and substantive instances of a bailor's interest in an application for bail or the reduction of the amount thereof and cannot by any stretch of imagination be said to be merely illusory.

The proposed bailor's stake in the entire bail exercise is of supreme importance. A breach of or non-compliance by an accused person with a condition of the bail eg, his non-attendance would render the bail sum liable to be estreated as the proposed bailor or the bailor would be served with a notice to show cause why the bail sum should not be estreated. These are practical illustrations of the *locus standi* of a proposed bailor.

On the foregoing grounds, I hold that the preliminary objection by the learned deputy is without merit and is hereby overruled.